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## Looking South: A Short Guide to Some Basic Considerations in Referring to United States Law in Connection with Canadian Judicial Proceedings

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## *I. Introduction*

Comparative law may be entering its golden age in Canada. Particularly with the advent of the new Canadian Charter of Rights and Freedoms, courts, practitioners and professors in Canada seem to be looking increasingly at the decisions of foreign tribunals for what guidance they may offer for the construction and development of Canadian law. For a number of fairly obvious reasons — the sheer number of American cases and their easy accessibility, common language, basic similarities in legal systems and so forth — there appears to be a very distinct trend toward reliance on United States cases in particular. An American practitioner with a considerable practice in the area of United States/Canada bilateral issues cannot, of course, help but welcome such developments as good for business. Judging from a number of recent instances of such attempts at legal borrowing, however, it would appear that a very basic summary guide to the nature of the United States judicial system might be of use to Canadians in their quest to find and understand United States law.

Americans tend to assume that the world in general, and Canadians in particular, know all about their legal and political systems. And there are many Canadians who do, at whom the present effort is not directed. But, for those Canadian lawyers who have had no particular reason to be familiar with the workings of the American judicial system, an attempt will be made here to offer a summary guide to the following: the hierarchy of American federal and state courts, and the scope of their jurisdictions; how to do rudimentary research in United States law (with apologies to the United States Bar); and some peculiar features of American practice and procedure as viewed from the North. Where pertinent, an attempt will be made to offer basic comparisons with the Canadian system.<sup>1</sup>

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1. Obviously, in comparative law situations, one looks primarily to judicial decisions on general points of law, and the focus here will be on the United States judicial system. In the

## II. *The United States Judicial System*

As compared to the jurisdiction of the Canadian Federal Court, in the United States, federal courts have much more extensive jurisdiction. Most parties to judicial proceedings in the United States usually would prefer to have their claims heard in the federal rather than the state court system, and the types of circumstances in which plaintiffs or defendants may file in a federal court, or remove to a federal court, are quite broad.<sup>1</sup> In the United States, in other words, unlike the situation in Canada, the federal judicial system is pervasive.

### 1. *The United States Federal Court System*

According to the United States Constitution, the federal judicial power is very extensive:

The judicial Power shall extend to all Cases, in Law and Equality, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.<sup>2</sup>

By contrast, the federal judicial power in Canada seems to an outsider much more circumscribed (at least below the Supreme Court level).<sup>3</sup> The

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United States context, however, with its superabundance of statutory and regulatory provisions, this means ignoring certain very important sources of law: namely, the decisions of numerous administrative tribunals and a wealth of agency determinations. Also, in the United States, legislative history is usually more readily available and referenced than is the case in Canada. These United States sources are, however, likely to be of lesser interest than judicial decisions to lawyers and Courts in Canada looking to foreign law for assistance and support in interpreting and developing Canadian law.

2. U.S. Const., art III, § 2 (abbreviated in the United States by the sign “§”), cl. 1 & 2. These provisions must be read in the context of the Eleventh Amendment to the U.S. Constitution, which specifies:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. Canadian Federal Court Act, R.S.C., c. 10 (2d Supp.), secs. 17-30. Under this act, for example, the Federal Court only has jurisdiction over intergovernmental disputes when the

distinction in the powers of the federal judiciaries in the two countries may be reflective of broader differences in philosophies of government. For example, the “Interstate Commerce Clause” in the United States Constitution has generated an enormous amount of far reaching legislation by the Congress pursuant to the few words granting it the power “[t]o regulate commerce . . . among the several States,” whereas no such tradition of pervasive federal power has developed in Canada.<sup>4</sup>

(a). *District Courts.* Like the Canadian Federal Court-Trial Division, United States district courts are the first or trial-level courts of general federal jurisdiction. There are, however, many more of them, and they have considerably broader jurisdiction than is the case in the Canadian federal judicial system. Like members of the Canadian judiciary, judges of United States district courts — as all United States federal judges — are appointed, to hold office “during good behavior.” As all of the United States federal judiciary, they are appointed by the President, with the advice and consent of the Senate,<sup>5</sup> and, while there may be political elements in their initial appointment, they usually come from among the most highly respected members of the legal profession.

Each of the 50 States has at least one United States district court, and some of the larger states have as many as four; no district court has geographic jurisdiction in more than one state. Altogether, there are 89 district courts in the 50 States, one for the District of Columbia and also one each for Guam, the Virgin Islands and the Commonwealth of the Marianas. Each district court has between one and twenty-seven district judgeships, and there are altogether over five hundred district court

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legislature of a province has so agreed, *id.*, sec. 19; it also lacks any diversity jurisdiction, *see infra* TAN 11.

4. The Interstate Commerce Clause is found at U.S. Const., art. I, § 8, cl. 3. *Compare* Canadian Constitution Act of 1867, sec. VI, para. 91(2). The broad content of the U.S. Interstate Commerce Clause has, of course, been read into its four words over time, but United States courts had a different federal/state system to build upon, and have historically had a different role in the law making process.

5. *See* 28 United States Code (“U.S.C.”) § This is the official federal code and the proper source to cite. Most United States lawyers actually use, however, the United States Code Annotated (“U.S.C.A.”) in doing their research, obviously because of the annotations. The states, of course, each have their own official annotated codes as well.

On appointment of judges of United States Courts of Appeals, *see id.* § 44, and the appointment of Supreme Court Justices is provided for in U.S. Const., art. II, § 2. On appointment of judges to the bench of specialized federal courts, *see* 28 U.S.C. §§ 171, 251. Sometimes lower court judges may be temporarily designated and assigned to sit on higher courts, and retired judges may be assigned to various active duties. *See id.* §§ 291-96.

On the tenure of federal judges, article III, § 1, of the United States Constitution provides as to the judicial power of the United States that: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”

judges.<sup>6</sup> Only one judge is usually required to hear and decide a case at this level, although in a few specific instances three-judge district courts are required by law.<sup>7</sup>

In addition, there are a few United States courts at the trial level which have nationwide jurisdiction, and can (and sometimes do) conduct proceedings at places reasonably convenient to parties in various parts of the country, including: the United States Claims Court (for the cognoscenti, a recent successor to the United States Court of Claims), which is headquartered in Washington, D.C.; the United States Court of International Trade, with principal offices in New York City; and the United States Tax Court, in Washington, D.C.<sup>8</sup>

One other body that may be encountered in looking at cases from United States district courts is the Judicial Panel on Multidistrict Litigation ("J.P.M.D.L."). Because of venue provisions (and also "forum shopping" — that being a common, although not so much admitted activity), cases may be pending in different United States district courts involving common questions of fact. In such situations, given the extensive pretrial discovery available to litigants in the United States (probably much more extensive than is at all usual in Canada), having to respond to similar requests in multiple jurisdictions could be burdensome. Consequently, the Judicial Panel on Multidistrict Litigation, which consists of seven Court of Appeals and district judges from around the country, is authorized temporarily to transfer to a single district, for coordinated or consolidated pretrial proceedings, civil actions pending in different districts with one or more common questions of fact.<sup>9</sup>

To focus on the courts of general federal jurisdiction, by statute, on the civil side, there are two main bases for invoking the jurisdiction of United States district courts: first, United States district courts have original jurisdiction over all "federal questions," that is, all civil actions arising under the Constitution, laws or treaties of the United States;<sup>10</sup> and second, they also have original jurisdiction in all cases of "diversity of citizenship," whether between citizens of different United States states or between U.S. citizens and foreign states or citizens, where the amount in

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6. For information on federal judges at all levels, see *Almanac of the Federal Judiciary* (S. Anderson ed. 1984); W. Dornette & R. Cross, *Federal Judiciary Almanac* (1984). On past and present federal judges, see also Bicentennial Committee of the Judicial Conference of the United States, *Judges of the United States* (2d ed. 1983). On United States federal and state judges, see *American Bench* (M. Reinecke & N. Lichterman eds. 1979).

7. See 28 U.S.C. § 2284.

8. For discussion of all these and other United States courts, and of litigation statistics, see generally Law & Business, Inc., *Lawyer's Almanac 1985*, at 606-730 (1985).

9. 28 U.S.C. § 1407.

10. 28 U.S.C. § 1331.

controversy exceeds the amount of value of \$10,000.<sup>11</sup> They also have original jurisdiction in nonjury civil actions, without regard to the amount in controversy, against foreign States or their agents or instrumentalities (where immunity is not applicable). In addition, federal district courts have original and exclusive jurisdiction in admiralty or maritime cases,<sup>12</sup> and in bankruptcy proceedings,<sup>13</sup> and they have original jurisdiction in a variety of other civil cases.<sup>14</sup>

And, on the criminal side, while in Canada the Federal Criminal Code is administered by provincial courts, the same is not true in the United States. By statute, United States district courts have original jurisdiction, exclusive of state courts, of all offenses against the laws of the United States.<sup>15</sup> Thus, in the United States, federal authorities bring prosecutions

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11. 28 U.S.C. § 1332. When federal courts sit solely pursuant to their diversity jurisdiction, they look to state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), held that, in diversity cases, “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State,” and that “there is no federal general common law.” It follows that “a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State.” *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). Of course, federal courts may and do have both federal question and diversity jurisdiction in a large number of cases. Moreover, a leading constitutional scholar has pointed out that the *Erie* Doctrine does not entirely limit the flexibility of federal courts; as is observed in L. Tribe, *American Constitutional Law* 119 (1978):

*Erie* suggests that, at least on this view, federal courts need not subordinate themselves to state courts, but rather need only act as state courts; *Erie* does not require a mechanical application of state precedent any more than a state common law court would today equate the common law of its state with merely the results, and not the rationales, underlying prior cases. Under both *Swift* [*Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)], and *Erie* then, federal diversity courts were and are common law courts, with all of the flexibility which that designation implies.

12. 28 U.S.C. § 1333.

13. 28 U.S.C. § 1334.

14. Included, with certain exceptions, are cases dealing with the following: interpleader; enforcement of orders of the Interstate Commerce Commission; commerce and antitrust regulations; patents, plant variety protection, copyrights and trademarks (such jurisdiction being exclusive as to the first three); postal matters; internal revenue provisions and customs duties; civil rights and elective franchise; election disputes; where the United States is a plaintiff; tax and certain other matters against the United States (concurrently with the United States Claims Court); partition where the United States is a joint tenant; where the United States is suing a national banking association; an alien's action for a tort committed in violation of the law of nations or a treaty of the United States; claims against consuls, vice-consuls, and members of diplomatic missions (which jurisdiction is exclusive); bonds executed under federal law; indian allotments; land grants from different states; fines, penalties or forfeitures under federal law (again exclusive); seizures under federal law (exclusive); injuries under federal law; eminent domain for federal use; mandamus of any officers or employees of the United States or any agency thereof; civil claims by indian tribes; jurors' employment rights; claims against insurers of members of diplomatic missions and their families; and declaratory judgments sought by the United States Senate or its committees or subcommittees concerning subpoenas. 28 U.S.C. §§ 1335-40, 1343-48, 1350-58, 1361-64.

15. 28 U.S.C. § 3231.

for federal offenses only in federal courts, unlike the situation in Canada (although the subject matter of federal criminal law may be somewhat less broad in the United States than it is in Canada).

The Federal Rules of Civil Procedure govern proceedings in United States district courts, and the Federal Rules of Criminal Procedure govern criminal proceedings in all federal courts.<sup>16</sup> Each district court also has its own supplementary operating rules.

It should be recognized that the United States Government, through the Attorney General, frequently appears as a litigant in the federal court system. The United States may be represented by Department of Justice lawyers from Washington, or attorneys from the local United States Attorney's Office. (A United States Attorney is appointed for each United States judicial district.)<sup>17</sup>

Attorneys admitted to practice in the state in which a United States district court sits are readily admitted to practice before that state's federal district court(s). Contrary to the situation in Canada, however, many litigators and firms in the United States have what is in effect a national practice (whether or not they may have offices in more than one state). They are regularly attorneys of record and argue, at least in federal courts, throughout the country. The usual practice is for an attorney conducting litigation in a state of whose Bar he or she is not a member also to have a "local counsel" (whose advice on the applicable law, as well as on local rules and custom, may be very helpful). Whatever else his or her role in the case, the local counsel signs written pleadings and requests leave for the out-of-state attorney to be heard when it is desired that the latter present oral argument (which is routinely permitted, at least in federal courts). Occasionally, however, for reasons of economy or otherwise, an out-of-state attorney may file a motion to appear and argue *pro hac vice*, for this particular case, without local assistance (which can be done only by leave of the Court). In general, however, to repeat, even if the local counsel serves only what is essentially a post-office function, it is usually deemed desirable to hire one.<sup>18</sup>

16. The Fed. R. Civ. P. and Fed. R. Crim. P. appear as annexes to Title 28 of the U.S.C. The same is true of the Federal Rules of Evidence (Fed. R. Evid.), which govern proceedings in United States federal courts and before United States magistrates.

17. On United States Attorneys, see 28 U.S.C. §§ 541-50. They both prosecute criminal offenses against the United States and represent the United States and its agencies and officers in civil proceedings. *Id.* § 547. There is also a United States Marshall appointed for each judicial district, whose duties involve execution of all writs, process and orders under authority of the United States. 28 U.S.C. §§ 561-75.

18. In the United States, usually soon after completing law school, lawyers take an examination and oath to become a member of the Bar of a particular state. Sometimes a lawyer may take another Bar exam, but there are also circumstances where a member of one state Bar may waive into that of another state (usually after 5 years or so in practice). No state has an articling requirement like those of Canadian provinces.

(b). *Courts of Appeals.* Upstairs from the United States district courts in the federal system are the United States Courts of Appeals, which are intermediate appellate courts. The United States is divided geographically into twelve judicial circuits, each of which has a Court of Appeals. Each of the 50 States is assigned to one of eleven Circuits (as are Puerto Rico and the territories), and there is also a separate United States Court of Appeals for the District of Columbia Circuit.<sup>19</sup> Three years ago, Congress added to these courts of general federal but limited territorial jurisdiction a new court of nationwide jurisdiction in limited subject areas: the United States Court of Appeals for the Federal Circuit, which is based in Washington, D.C., but may (and sometimes does) sit elsewhere. Each of the above appellate courts has between four and twenty-three permanent judges, for a total of 144.

In addition, from time to time the United States Congress has created special courts, a recent example of which is the Temporary Emergency Court of Appeals, which was given exclusive jurisdiction to hear all appeals from district courts wherever situated in cases arising under the (now-defunct) economic stabilization laws. It is composed of appellate and district judges from around the country.<sup>20</sup> There is also a United States Court of Military Appeals, which is an appellate criminal court to review court-martial convictions of all of the armed services.<sup>21</sup>

Just as United States district courts have much broader jurisdiction than the Trial Division of the Canadian Federal Court, so too, of course, do United States Courts of Appeals. The Court of Appeals for the First through Eleventh Circuits and the Court of Appeals for the District of Columbia Circuit are empowered to review all final decisions<sup>22</sup> and certain interlocutory decisions (concerning injunctions, appointing receivers, and determining rights and liabilities in admiralty cases)<sup>23</sup> of all United States district courts within their judicial circuit.<sup>24</sup> In addition, when a district judge, in making an interlocutory order not otherwise immediately appealable, states the opinion "that such order involves a

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State Bar exams typically consist of a "multi-state" series of short answer questions on general common law and federal law and a series of essay questions formulated by the state. Although there is no articling requirement, many United States law school graduates seek one or two-year positions as law clerks to judges, see *infra* TAN 64, or initial jobs with major law firms for the training.

19. See 28 U.S.C. § 1294. Until recently there were only 10 numbered circuits, but in 1981 the 11th Circuit was split off from the 5th (pursuant to a statute passed by the U.S. Congress the year before).

20. See 85 Stat. § 743.

21. See 10 U.S.C. § 867.

22. 28 U.S.C. § 1291.

23. 28 U.S.C. § 1292.

24. See 28 U.S.C. § 1294.



controlling question of law as to which there is substantial ground for difference of opinion and that an intermediate appeal from the order may materially advance the ultimate termination of the litigation," a Court of Appeals may, at its discretion, permit an appeal.<sup>25</sup> (Such statements by district courts are, however, far from routine.)

The nearest analogue to the Canadian Federal Court of Appeal is probably the new United States Court of Appeals for the Federal Circuit, although the jurisdiction of the latter is considerably narrower than that of the Canadian Federal Court of Appeal. The Federal Circuit Court of Appeals has exclusive jurisdiction of: all appeals from final decisions of district courts in patent cases; appeals from final decisions of district courts in actions against the United States for non-tort monetary (Tucker Act) claims not exceeding \$10,000; appeals from decisions of various bodies within the Patent and Trademark Office; appeals of final decisions of the United States Claims Court and the United States Court of International Trade; and review of administrative rulings by the United States International Trade Commission, the Secretary of Commerce concerning Tariff Schedules, the Merit Systems Protection Board and agency boards of contract appeals.<sup>26</sup> Previous to the creation of this appellate court in 1982, some of these decisions were heard by appeal within the tribunal which made them and were reviewable only by certiorari to the United States Supreme Court. The Federal Circuit Court of Appeals lacks the admiralty jurisdiction and some of the federal statutory jurisdiction of the Canadian Federal Court of Appeal.

United States Courts of Appeals normally sit in panels of three judges, but may rehear (and occasionally hear) cases *en banc*.<sup>27</sup> Procedures in all of them are governed by the Federal Rules of Appellate Procedure.<sup>28</sup> Unlike most Canadian courts (including the Supreme Court) where attorneys can hold forth at length, United States Courts of Appeals often consider cases on the written pleadings alone, and when oral argument is

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25. 28 U.S.C. § 1292(b). In such cases an application for appeal does not stay cases in the district courts unless the district judge thereof so orders. The United States Court of Appeals for the Federal Circuit may similarly permit appeals certified by judges of the United States Claims Court and the United States Court of International Trade, again without necessarily staying proceedings in the lower court. 28 U.S.C. § 1292(d).

26. See 28 U.S.C. § 1295.

27. There is some difference among the United States Courts of Appeals when sitting as the full bench. As has been observed, *supra* TAN 19, the number of appellate judges varies widely among the Circuits. For example, at the time *Want's Federal State Court Directory* (1985 ed.) was compiled, the First Circuit had 5 judges and 1 Senior Judge, while the Ninth Circuit had 23 Judges and 8 Senior Judges. *Id.* at 3, 6. Obviously, there is more potential for intra-Circuit disagreement in some cases than in others, and over time one notices certain characteristics of the various Courts of Appeals.

28. The Fed. R. App. P. appear as an annex to Title 28 of the U.S.C. See also *supra* note 16.

ordered it is usually very short (between fifteen and thirty minutes per side).<sup>29</sup>

(c). *Supreme Court.* At the Supreme Court level, the differences between the United States and Canadian systems narrow, but they are still significant. Both Supreme Courts have eight Associate or puisne Justices and a Chief Justice<sup>30</sup> (both, as has been said, appointed rather than elected in the two systems), to hold office “during good behavior.” Both review decisions of federal courts and of the highest appellate courts of the individual states or provinces. And both sit in the nation’s capital.<sup>31</sup>

While the Supreme Court of Canada sits in panels, both to consider motions for leave to appeal and actually to hear cases (except certain very important cases which are heard by the whole Court), the United States Supreme Court always sits *en banc* (except for certain emergency motions which may be dealt with by a single Justice). While in Canada five Supreme Court Justices constitute a quorum, and four Justices may constitute a quorum with the consent of the parties to the case, six United States Justices are required for a quorum.<sup>32</sup>

As is not the case in Canada, moreover, the United States Supreme Court has original jurisdiction in some instances. It has original and exclusive jurisdiction over all controversies between two or more states, and it has original but not exclusive jurisdiction in three types of cases: (a)

29. When counsel is arguing, usually a little white or yellow light goes on on the lectern when five minutes remain in the argument, and a red light illuminates when time has been exhausted. For time limits, see, e.g., First Circuit Rule 13(b); Second Circuit Rule 34(d); Eighth Circuit Rule 10(b). See also Third Circuit Statement of Internal Operating Procedures chap. 2A; Fourth Circuit Statement of Internal Operating Procedures I.O.P. 34.3; Sixth Circuit Statement of Internal Operating Procedures 13.4; Eighth Circuit Statement of Internal Operating Procedures V-B.6 (which explains the lights); Ninth Circuit Statement of Internal Operating Procedures G; Eleventh Circuit Statement of Internal Operating Procedures V-A.10; Federal Circuit Statement of Internal Operating Procedures 21.

Unlike the Supreme Court of Canada, the United States Supreme Court puts time limits on arguments. Unless otherwise ordered, each side is allowed 1/2 hour. Supreme Court Rule 38.3 See *infra* note 39.

30. Members of the United States federal judiciary, it might be noted in passing, are called “Judges,” and in rare instances “Chief Judges,” below the level of the Supreme Court. While those who sit on the Federal Court of Canada are called “Chief Justice” and “Justices,” those labels are reserved for the Supreme Court in the United States federal system; in the modern gender-neutral world, United States Supreme Court Justices have dropped the designation “Mr. Justice.” Members of the United States federal judiciary are addressed as “Your Honor,” and they have the title “The Honorable.” In the state systems also (although there appear to be some exceptions), trial and intermediate appellate courts have “Judges” and “Chief Judges,” while the Supreme Court of each state is composed of “Justices” and a “Chief Justice.” Members of the United States judiciary collectively should no longer be called “brethren.”

31. 28 U.S.C. § 1. A sort-of exception to the statement about sitting in the capital may be the current experiment by the Supreme Court of Canada in hearing argument on motions for leave to appeal by video connection with attorneys located at various points around the country.

32. Compare 28 U.S.C. § 1; Canadian Supreme Court Act, R.S.C. 1970, c. S-19, secs. 25, 29.

all actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls are parties; (b) all controversies between the United States and a state; and (c) all actions or proceedings by a state against the citizens of another state or against aliens.<sup>33</sup> In exercising its original jurisdiction, the Supreme Court neither sits interminably listening to facts nor imposes its usual time limits; rather, the Court appoints a Special Master who hears the case much as a district court would, and the Supreme Court itself rules on the Special Master's Report (and may, and usually does, hear some argument thereon). By far the majority of invocations of the Supreme Court's original jurisdiction have been in the first type of situation described above, and at least most recent instances have concerned land or water boundaries between states. In any event, when one comes across discussion by the Court of a Special Master's Report, this is what is happening.

Parties have a right of appeal to the United States Supreme Court in certain very limited types of cases.<sup>34</sup> In the overwhelming majority of civil and criminal cases, however, a hearing may be had in the Supreme Court only by petition for writ of certiorari. The grant or denial of certiorari is discretionary on the part of the Supreme Court. The Justices may choose to consider a question the first time it is ruled upon by a United States Court of Appeals, or may wait for a conflict to develop among the Circuits, or may do whatever else they see fit.<sup>35</sup>

Judgments or decrees of the highest courts of the states may also be reviewed by the Supreme Court. In certain limited cases such judgments or decrees may be appealed to the Supreme Court.<sup>36</sup> Again, however, as

33. 26 U.S.C. § 1251. The third category, actions by a state against citizens of another or aliens, does not, of course, mean that the Supreme Court has original jurisdiction over all criminal actions by states against outsiders. Prosecutions under state criminal laws go to state courts, and federal prosecutions are in the name of the United States.

34. From the federal system, these include appeals: (a) from any interlocutory or final judgment, decree or order of any United States court (*i.e.*, including district courts) holding an Act of Congress unconstitutional in any civil case to which the United States, or any of its agencies, or any officer or employee thereof, is a party; (b) from orders granting or denying injunctive relief in the rare civil actions required to be heard by three-judge district courts; and (c) by a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. 28 U.S.C. §§ 1252, 1253, 1254(2). In addition, Courts of Appeals may certify questions to the Supreme Court, which the latter may or may not choose to hear, 28 U.S.C. § 1254(3), much as district courts may certify questions to Courts of Appeals under 28 U.S.C. § 1292(b), discussed above.

35. Cases in United States Courts of Appeals may be reviewed at the discretion of the Supreme Court by writ of certiorari "granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254(1).

36. These include review by appeal where either (a) the validity of any United States treaty or federal statute is drawn into question, and the decision is against its validity; or (b) the validity of any state statute is drawn into question as repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. 28 U.S.C. §§ 1257(1) & (2), 1258(1) & (2).

with decisions of federal Courts of Appeals, Supreme Court review of state court decisions is in the overwhelming majority of cases discretionary, on petitions for certiorari. Review may be had in the Supreme Court on cert. where the validity either of a treaty or federal statute is drawn into question, or where the validity of a state statute is drawn into question, on grounds of repugnance to the Constitution, treaties or laws of the United States. State court judgments or decrees may, in addition, be reviewed by writ of cert. where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of the United States, or of a commission held or authority exercised under the United States.<sup>37</sup> In other words, as a general rule, state court decisions may be reviewed when they touch upon questions of federal law.

“Certiorari” is literally the calling up by a superior court of the records of a lower court, and the granting of a petition for writ of certiorari by the United States Supreme Court practice is analogous to the Supreme Court of Canada granting a motion for leave to appeal.<sup>38</sup> In the United States, however, cert. petitions are considered only on the written record, as opposed to the practice by the Canadian Supreme Court of hearing argument on leave to appeal motions.

As Canadians often know from the movie, the United States Supreme Court commences its term each year on the “First Monday in October.”<sup>39</sup> The term continues as long as the business of the Court requires, which usually means until about the end of June. The Supreme Court now regularly, in one way or another, disposes of around 5,000 cases per year, and in addition, some 1,200 applications of various kinds are filed which can be acted upon by a single Justice.<sup>40</sup> (Each Justice of the Supreme Court has responsibility for one or more federal circuits,<sup>41</sup> and may, for example, grant stays of the execution or enforcement of judgments or decrees issued therein.<sup>42</sup>)

Unlike old soldiers, United States Supreme Court Justices rarely fade away, and indeed have often proved notably hardy and long-lived. While this has at times been regretted, as by President Franklin Delano Roosevelt in his references to the “Nine Old Men,” the fact that, once

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37. 28 U.S.C. §§ 1257(3), 1258(3).

38. Canadian Supreme Court Act, *supra* note 32, sec. 41.

39. 28 U.S.C. § 2. The Supreme Court Rules, (Sup. Ct. R.) like those of the lower federal courts, *supra* notes 16 & 28, are annexed to Title 28 of the U.S.C.

40. See *Lawyer's Almanac 1985*, *supra* note 8, at 607, 692. The Almanac gives litigation statistics for all of the various United States federal courts. *Id.* at 692-730.

41. 28 U.S.C. § 42.

42. 28 U.S.C. § 2101(f).

reaching the apogee of appointment to the Supreme Court,<sup>43</sup> Justices serve “during good behavior”<sup>44</sup> is considered in the United States — as in Canada — to be vital to the Constitutional mandate and tradition of an independent judiciary.

## 2. *The State Court System*

There should be many fewer instances where Canadians will wish to refer to precedents from the United States state court system, as compared to the federal system. The primary reason for this is the extremely pervasive jurisdiction of United States federal courts — and particularly their “federal question” jurisdiction, which can result in United States district courts overturning the decisions of even the highest courts of the states.<sup>45</sup> The reach of the United States Constitution and statutes is so broad that opportunities for challenging state decisions on political and civil rights grounds abound. Parties by far usually prefer to be in federal system when they have the option, because of the greater experience of federal courts in reviewing federal questions, or of fear of local prejudice in state courts (which is basically why diversity jurisdiction was created), or of qualms about the state judiciary the vast majority of whom must get elected every couple of years (in contrast to the “good behavior” of

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43. United States Supreme Court Justices are, to repeat, appointed by the President with the advice and consent of the Senate, with no explicit requirements as to geographic or other diversification. See *supra* TAN 5 and note 5. Compare Canadian Supreme Court Act, *supra* note 32, secs. 4-6. Standing at the top of the United States judicial pyramid, Supreme Court Justices are the highest paid members of the judiciary and can do anything those downstairs can do (except perform weddings). See generally the “All Writs” clause, 28 U.S.C. § 1651.

From his elevated position at the head of the Supreme Court, the Chief Justice of the United States annually calls together the Chief Judges of each judicial Circuit and a district judge from each Circuit as the Judicial Conference of the United States. 28 U.S.C. § 331. United States federal judges also regularly congregate in a number of other conferences and councils. See *id.* §§ 332-34.

44. Of the life tenure of those who serve on the United States federal bench, see *supra* note 5; see also Canadian Supreme Court Act, *supra* note 32, sec. 9. Of course, United States Supreme Court Justices may resign or retire. Any member of the United States federal judiciary may resign after attaining age 70 and after serving at least 10 years and continue to receive the full salary being received upon resignation. United States Justices and judges may retain their offices but retire from regular active service upon attaining the age of 70 after serving at least 10 years or the age of 65 after serving 15 years; such Senior Justices or Senior Judges continue to receive the salary of their offices. 28 U.S.C. § 371. It would appear that in Canada, the retirement age for Justices of the Supreme Court is 75, and of the Federal Court 70. Canadian Supreme Court Act, *supra* note 31, sec. 9(2); Federal Court Act, *supra* note 3, sec. 8.

45. The prime example that comes rapidly to mind is federal *habeas corpus*. A defendant who has exhausted state law remedies may file a petition for a writ of *habeas corpus* in a United States district court on the ground of being in custody in violation of the Constitution, laws or treaties of the United States. See 28 U.S.C. § 2254 and the *Habeas Corpus* Rules following that section.

federal judges)<sup>46</sup> or for a number of other reasons — none of which they are likely to want to articulate. This is by no means to impugn members of the state judiciaries, who, like those on the federal bench, are among the most highly respected members of the legal profession; it might be observed, however, that it would be a rare state court judge — even a justice on the highest state court — who would not be flattered by an offer of appointment to a United States district court.

In light of the broad scope of the jurisdiction of the United States federal judicial system, and, to repeat, particularly since it includes all “federal” including constitutional questions, Canadians will mostly want to refer to decisions of federal courts. Since state courts can and do with some frequency rule on questions of federal law, or where for some reason a question of state law is of interest (perhaps where a state statute of limitations governs), it might be desirable to cite the highest court of a state. One then has to be careful, however, as to which court that is; as in nearby Ontario and other provinces, in New York the Court of Appeals hears appeals from the Supreme Court.<sup>47</sup> And in the state system generally, one can encounter other idiosyncracies. For example, while in the United States there is not the marked divide between civil and common law one finds in Quebec, Louisiana is an exception in having a

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46. In the United States, state judges are subject to election and reelection (partisan or nonpartisan) in the following 25 States: Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin. In addition, while judges initially take office by gubernatorial appointment or from a nominating commission, they are subject to retention elections of some sort in all states except Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, South Carolina and Virginia. *Lawyer's Almanac 1985*, *supra* note 8, at 645-51.

The terms of the judiciary range from 6 to 12 years in the states' highest courts (except in Massachusetts, New Jersey and Rhode Island, where there is life tenure); from 4 to 12 years in intermediate appellate courts in states that have them (except Massachusetts and New Jersey — Rhode Island has none); and from 2 to 14 years in courts of limited jurisdiction (with the same three exceptions). *Id.*

For the names of all current members of the federal and state judiciary, see *Want's Federal-State Court Directory*, *supra*, note 26. This directory also contains diagrams of all the state judicial systems.

47. In Maryland, the Court of Appeals is also the highest court; and the same is true of the District of Columbia (which has the equivalent of a state court system, and one has to distinguish between the District of Columbia Court of Appeals, which hears appeals from the District of Columbia Superior Court, and the United States Court of Appeals for the District of Columbia Circuit, the federal appellate court discussed earlier). Oklahoma and Texas each have two courts of final jurisdiction, the state Supreme Court on the civil side and the Court of Criminal Appeals. Kentucky in 1976 renamed its Court of Appeals to be its Supreme Court, and simultaneously created an intermediate Court of Appeals (making it necessary to pay attention to the year of decisions). Most of the 50 States have intermediate courts of appeals, but some 18 of them and the District of Columbia do not. There may be other anomalies in the system. See *Want's Federal-State Court Directory*, *supra* note 27, at 67-119.

civil law tradition (which is a characteristic of the legal system rather than the state court system *per se*, but which may affect decisions in the latter).

In general, as has been said, contrary to the situation in Canada, in the United States Canadians probably want to stay out of the state court system whenever possible. Should they come into courts in the United States on civil matters as plaintiffs, or be called there as defendants, as do Americans, when there is a choice, Canadians would be well advised in most instances to opt for the federal alternative (although on the criminal side, they are not likely to have a choice, except for *habeas corpus* actions). The same general advice is applicable when relying upon United States precedents to bolster arguments in Canada: look for cases in the United States Supreme Court, Courts of Appeals and district courts (obviously in that order of preference); you might add a few state Supreme or highest court cases, but if you find yourself relying on state trial courts or intermediate courts of appeal, some caution is warranted.

This interminable discussion may seem irrelevant since, after all, in comparative law situations, one does not refer to foreign judicial decisions for any precedential value. Rather, one looks to them for guidance, and for support in the arguments found persuasive by another court in analogous circumstances. But a knowledge of the foreign judicial system should help one to locate appropriate cases, and to determine the prevailing law of that jurisdiction. Moreover, it is undoubtedly endemic to the nature of litigators, and of judges, to prefer to rely upon higher authority.<sup>48</sup>

### III. *How to Find United States Law*

The main thing one notes about United States cases is that there are so many of them. Consequently, there being little new under the sun — *i.e.*, very few cases of first impression — whatever the legal finepoint, one expects to find that someone has argued it to a United States court. The question then becomes the proverbial one of finding a needle in the haystack — which is actually quite easy as far as United States cases are concerned.

#### 1. *Reporters and Finding Aids*

As background knowledge, one should have a basic idea of the reporting system. The United States Supreme Court has its own official reports,

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48. Obviously there is a second type of situation where resort is had to foreign law: *i.e.*, where under choice of law rules, foreign law governs and is to be pleaded and proved. In such circumstances, expert advice on the foreign law is sought. Here too, however, a basic knowledge of the legal system in question can be most useful in enabling one to form an initial impression of the applicable law and to better understand and work with the foreign expert.

known, not surprisingly, as *United States Reports*. West Publishing Company, about which a lot more will be said, also reports Supreme Court decisions in the *Supreme Court Reporter*, and these decisions are also printed in a third source known as the *Lawyers Edition*. The West Publishing Company similarly publishes the decisions of all United States Courts of Appeals in what is now the *Federal Reporter, Second Series* ("F.2d").<sup>49</sup> It reports district court decisions in two companion series, substantive decisions in the *Federal Supplement* ("F. Supp.") and those concerned with federal procedure in the series known as *Federal Rules Decisions* ("F.R.D.").<sup>50</sup>

Each of the states has its own official reporting system. Notable state court cases are, however, also reported by the West Publishing Company in a series of six regional reporters: Atlantic (now "A.2d"); Northeast ("N.E.2d"); Northwest ("N.W.2d"); Pacific ("P.2d"); Southern ("So. 2d"); and Southwestern ("S.W.2d").

Every one of the cases published by West Publishing Company is published with a series of summary headnotes keyed to a comprehensive outline of all areas of United States law, with each numbered subcategory designated by a special Key symbol ("Key Numbers"). In this outline, for example, constitutional law is divided into twelve main headings (Establishment and Amendment of Constitutions; Construction, Operation and Enforcement of Constitutional Provisions; Distribution of Governmental Powers and Functions, and so forth) and subdivided into 329 numbered subheadings or Key Numbers, many with multiple parts. West then publishes a *Federal Practice Digest* (now the Third) arranging the headnotes from all the cases from all courts in the United States federal system under its outline topic numbers. West also publishes *Decennial Digests* (now the Ninth), with periodic updates in a *General Digest*, containing the information from the *Federal Practice Digest* plus all of the state cases from its regional reporters under the same Key Numbers system. In addition, West also publishes digests for five of its six regional state law reporters (*i.e.*, all except Southwest).

Not only is it possible to follow topics, however, but also one can trace the history of any particular case and of subsequent citations to an

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49. For those interested in legal history, before 1880 the reporter was *Federal Cases* ("F. Cas.").

50. There are a few wrinkles in this system in respect of cases from the old and now defunct Court of Claims and with the Court of International Trade (and its predecessor Customs Court) and the Court of Customs and Patent Appeals. Some of their decisions are found in F.2d and F. Supp., but they also have their own official reporters. There is also a Bankruptcy Reporter ("Bankr."), the Tax Court of the United States Reports ("T.C."), the Military Justice Reporter ("M.J."), and various other past and present special official reporters. But, at least on matters of constitutional law, perhaps Canadians may be less likely to seek guidance in the decisions of these specialized courts.



individual point therein in something known as *Shepards Citations*. For each individual case, in other words, using this citator ("Shepardizing"), one can find out whether it has been affirmed or overruled or has a *cert. denied*, *granted*, *dismissed* or *vacated* by the Supreme Court, and whether it has been cited for each particular headnote to the case in any subsequent decision by any federal or most state courts; such a search will also reveal whether the case has been discussed in any law journal articles. There are also Shepards citators for United States statutes (which include treaties in force for the United States), giving all of this same information.

In addition, making the most of modern technology, all United States federal and state cases, almost as they come out from courts in slipsheets, are available on two computer retrieval systems. Lexis is a word retrieval system that enables one to find cases not only by subject matter but also by court, judge, plaintiff, defendant, counsel and a number of other ways; it will also Shepardize a case. Westlaw, not surprisingly, is the West Publishing Company system and makes use of West Key Numbers. European cases and materials, and those from certain other foreign jurisdictions, are on United States computer services — but not yet those from Canada.

Cases, administrative materials and brief commentaries are also often published unofficially in topical compilations or "looseleaf services," and are sometimes later published from these in bound volumes. There are well over a hundred such services, ranging from the Abortion Law Reporter, Accountancy Law Reporter and Administrative Law Reporter to the Wills, Estates and Trusts Service and Workmen's Compensation Law Reporter. Some of the better known services are those published by the Bureau of National Affairs ("BNA"), Commence Clearing House ("CCH"), and Prentice-Hall ("P-H").<sup>51</sup> CCH, of course, similarly publishes a number of Canadian law reporters.<sup>52</sup>

The bible for citing United States cases, legislative materials, legal periodicals, statutes and so forth is *A Uniform System of Citation*, now in its Thirteenth Edition (1981).<sup>53</sup> This most useful little book, known as the

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51. Other companies publishing services include Callaghan & Co. ("Callaghan"), Mathew Bender ("MB") and Pike & Fischer ("P&F").

52. These CCH reporters include: a Canadian Commercial Law Guide, Corporations Law Reporter, Health Facilities Law Guide, Labour Law Reporter, Product Safety Guide, Sales Tax Reporter, Securities Reporter and Tax Reporter; a Provincial Inheritance and Gift Tax Reporter; Tax Reporters for British Columbia, the Maritimes, Ontario and Quebec; and perhaps other Canadian services. There are, of course, also a number of other Canadian services.

53. While on the subject of helpful little books, it is worth noting in passing that, every year or so, West Publishing Co. publishes the Federal Rules of Civil Procedure, Evidence and Appellate Procedure, plus relevant sections of the U.S.C. and other materials, in a book on

“Blue Book” or “White Book” or whatever the current color of its cover (the 13th edition is blue), is a joint effort of the Columbia Law Review, the Harvard Law Review Association, the University of Pennsylvania Law Review and the Yale Law Journal. In addition to its usefulness in telling how to cite United States law and explaining citations that one comes across, Canadians may find the Blue Book very helpful for ascertaining what United States looseleaf services and other sources may be available on a particular topic, for the summary information on case reporters and statutory compilations for all United States federal and state courts (indicating hierarchies of the courts) and legislative bodies and those of a number of foreign countries as well, and for a number of other reasons.

## 2. *Researching United States Law*

This is, of course, not the place for a long exposition on researching United States law.<sup>54</sup> That task, however, seems to be generally easier than researching Canadian law.

Just as one might start a foray into Canadian law by turning to the *Canadian Abridgement* or the *Ontario Digest* or some similar source, that is a sensible way to begin researching United States law (although, if one happens to be concerned with a particular statute, an alternative would be to start with the United States Code Annotated<sup>55</sup>). Indeed, this might be standard practice, except that younger lawyers may prefer to start their topical search using one of the computer systems instead of a digest. The big difference, however, is that upon clueing into a case directly on point or nearly so, one can use *Shepard's Citations*, either in bound volumes or on a computer, to trace a subsequent line of cases — as has been said, to find every succeeding case, law journal article, etc. that relied on a case for a given point or on a particular section of a statute.

Indeed, any United States case one wishes to cite should be Shepardized, in order to check its subsequent history. The digests will usually but not always note any reversal or affirmance of a United States case, as well as if the Supreme Court has acted on a petition for writ of certiorari. Similarly, any subsequent references to a case in a judicial opinion or law journal note will usually but not always cite it correctly, which means including its history on appeal and certiorari (assuming, of course, that the subsequent mention was long enough after the original case for the latter to have finished its perambulation through the judicial

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*Federal Civil Judicial Procedure and Rules*. West does the same for the Federal Rules of Criminal Procedure.

54. See generally J. Jacobstein & R. Mersky, *Legal Research Illustrated* (2d ed. 1981).

55. See *supra* note 7.

system). These methods are not, however, as reliable as checking for oneself.

The subsequent history, like the source, of a United States case may theoretically make no difference as far as a Canadian lawyer is concerned. Once again, one cites comparative law examples only for their inherent persuasiveness and not for any precedential value. Still, there is a marked tendency among Bench and Bar to regard the power of reason of courts generally as directly proportional to their ascendancy in the judicial hierarchy.

As to actually citing cases, in the United States, when citing a federal or state court decision, one is supposed always to specify from what court it comes. For federal cases, it is important to know from which district court a decision is, so that one can tell to which Circuit it belongs; and Court of Appeals decisions should similarly be designated by Circuit. This is not important in Canada, where the Federal Court of Appeal has national jurisdiction; but in the United States there may often be a conflict between two or more Circuits for some time before the Supreme Court resolves the issue (giving rise to such things as a "majority rule" and a "minority rule"), and where a case comes from is one of the first things a United States lawyer will want to know. For state court decisions as well as federal, one should indicate the state from which it comes and the level court; while, again, technically this is irrelevant in a comparative law situation, it may nevertheless affect the suasive value of the opinion. What, if anything, the Supreme Court has done on certiorari is also important information. In strings of cases, in the United States, they are correctly organized according to their judicial hierarchy, with those of the United States Supreme Court first, followed by other federal courts, followed by state courts, and lastly by foreign common law and then civil law jurisdictions (cases in the same category appearing in inverse chronological order).<sup>56</sup>

In sum, the task of doing comprehensive research on a particular question, even a very obscure question, under United States law is not nearly as formidable as might be imagined. Even a very sophisticated Canadian lawyer, analogizing to the sources available for researching Canadian law, is likely to feel much more intimidated than the situation warrants. There are a great number of United States courts, and they

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56. A combined cite illustrating some of the foregoing would look as follows (except that if it were in text, as opposed to here in a footnote, the case names would be underscored):

*See, e.g.,* Canadian Ace Brewing Co. v. Anheuser-Busch, Inc., 448 F. Supp. 769 (N.D. Ill. 1978), *aff'd mem.*, 601 F.2d 593 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979); Canadian Transport Co. v. United States, 430 F. Supp. 1168 (D.D.C. 1977); Canada Dry Bottling Co. v. Mertz, 264 Pa. Super. 480, 400 A.2d 186 (1979).

issue a seemingly endless chain of opinions, but there are highly developed conventional and computer research tools which are fully adequate to the task of locating the applicable law with reasonable alacrity. The real problem in drawing on United States legal sources is no different from dealing with those in Canada: namely, their reasonable interpretation and application to particular sets of circumstances.

#### IV. *Some Differences in the Systems*

As a final thought in approaching this question of reference to United States decisions for guidance or support in preparing arguments in Canada, it is important not to be overwhelmed by the sheer abundance of United States cases. Things must be viewed in their proper perspective. Apart from the difference in the populations of the two countries, it is a fact — although rather hard to document in the abstract — that Americans tend to be more litigious than Canadians; the threat “I’ll sue you” has more likelihood of being realized south of the border. What can be documented is that, in 1983, there were over 622,000 lawyers in the United States, or one for every 375 people; by contrast, in Canada in 1981 there were 34,205 lawyers, with a population ratio of 1:712.<sup>57</sup> Apart from the 5,000 or so cases dealt with in the United States Supreme Court,<sup>58</sup> in 1984, some 31,490 appeals of all kinds were commenced, 31,185 appeals were terminated and 22,785 were pending in United States Courts of Appeals;<sup>59</sup> the comparable figures for the district courts were 261,485, 243,113 and 250,292 civil cases and 36,845, 35,494 and 19,938 criminal cases.<sup>60</sup> And, for those who are interested, the *The Lawyer’s Almanac 1985* publishes a lot of other intriguing

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57. *Lawyer’s Almanac 1985*, *supra* note 8, at 128; compare Statistics Canada, 1981 Census, Tables 1.8, 1.13. Since the United States figures are for 1983 and the Canadian for 1981, this is not a precise comparison. In 1980, however, there were 535,000 U.S. lawyers and the ratio was 1:418. As far back as 25 years ago, in 1960, there were 250,000 U.S. lawyers and the ratio was already 1:632, *i.e.*, higher than the Canadian 1981 ratio. *Lawyer’s Almanac 1985*, *supra*, at 128.

58. The United States Supreme Court, in 1982, had 5,079 cases on its docket, 17 of which came under its original jurisdiction. Of these, 4,201 were disposed of in 1982, and 878 remained on the docket. *Lawyer’s Almanac 1985*, *supra* note 8, at 692.

59. *Lawyer’s Almanac 1985*, *supra* note 8, at 693. These figures include both civil and criminal appeals, and they also include other appeals such as bankruptcy and administrative agency appeals, and certain actions for which original proceedings are authorized in federal appellate courts. At the time, U.S. Courts of Appeals had a total of 132 authorized judgeships. *Id.*

For profiles of the workloads of all of the United States Courts of Appeals and district courts for the period 1978 through 1983, see generally Administrative Office of United States Courts, *Federal Court Management Statistics* (1983).

60. *Lawyer’s Almanac 1985*, *supra* note 8, at 698, 712. In 1984, there were 515 authorized federal district court judgeships. *Id.* at 698.

statistics compiled by the Administrative Office of United States Courts.<sup>61</sup>

Although hard to prove, it would also seem fair to say that litigation tends to be more complicated and possibly flamboyant in the United States than in Canada. In this connection, it is worth noting that *The Lawyers' Almanac 1985* lists around one hundred "Who's Who Among Litigation Support Venders, Advisers" (and this list, mostly of computer consultants, does not include all of the graphic consultants who regularly assist lawyers in the display of their facts).<sup>62</sup> And there are literally hundreds of law journals in the United States reporting on and analyzing legal developments, including, of course, litigation.<sup>63</sup>

For those who are curious as to how United States courts manage to handle the huge loads that come before them, it is worth noting that the institution of law clerks is much more highly developed in the United States than in Canada. While Justices of the Supreme Court of Canada may have two law clerks each, and there are currently six law clerks for the ten Justices of the Federal Court of Appeal, United States Supreme Court Justices are now entitled to four law clerks apiece, Court of Appeals Judges to three and district judges to two (and there are sometimes additional clerks, for example serving Senior Judges). State judges also have law clerks serving them individually or courts as a whole.<sup>64</sup>

United States district courts also have the assistance of magistrates.<sup>65</sup> The magistrates hear and determine certain nondispositive and dispositive pretrial matters, and they hear prisoners' petitions (primarily for writ of *habeas corpus*); magistrates can also try cases by consent of the parties. Objections may be made concerning a magistrate's report to a district judge, who then makes a determination *de novo*; and in certain circumstances review by a district judge may be had by appeal from the decision of a magistrate.<sup>66</sup> State trial courts also frequently have magistrates (e.g., to handle domestic relations matters).

In spite of all of the above, there are a few types of cases in the Canadian system that are not found in the United States. For example, there is no parallel in the United States to the jurisdiction of the Supreme Court of Canada to consider references from the Governor General in Council or Parliament.<sup>67</sup> As to the same power of provincial courts to

61. See also *Want's Federal-State Court Directory*, *supra* note 27, Appendix.

62. *Id.* at 148-62.

63. See *id.* at 287-99.

64. On law clerks in the United States, see, e.g., Oakley, "Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges," 67 *Calif. L. Rev.* 1286 (1979). But see Kester, "Law Clerk Explosion," 9 *Litigation* 20 (1983).

65. The Magistrates Act is found at 28 U.S.C. §§ 630-39.

66. See 28 U.S.C. § 636; Fed. R. Civ. P. 72; Fed. R. Crim. P. 54(b) & (c).

67. Canadian Supreme Court Act, *supra* note 32, secs. 55-56. The provision for references to

hear references from provincial governments, there are only one or two similar or related instances in the United States: for example, the Supreme Court of Florida is empowered to answer questions on Florida law certified to it by federal courts, and the Massachusetts Supreme Judicial Court gives advisory opinions on questions raised by the legislature, as well as the Governor or Council.<sup>68</sup> The United States has a Declaratory Judgments Act<sup>69</sup> allowing federal courts to declare the rights or other legal relations of parties whether or not further relief is sought, but the purpose of this legislation is to allow parties uncertain of their rights to avoid accrual of avoidable damages (“[i]n a case of actual controversy”), not to enable the equivalent of references. It may be also that Canadian courts will consider certain cases which United States courts would regard as moot and decline to decide.<sup>70</sup>

In comparing the judicial systems of Canada and the United States, one has to look not only at the role of courts, but also at that of other actors. For example, with the advent of the Canadian Charter, a number of liberals (with a small “l”), academics and others appear to be advocating a more activist role for Canadian courts along the lines of the United States model in the areas of human rights law, civil liberties and other constitutional questions. In doing so, however, they perhaps overlook the fact that legal activist organizations — such as the American Civil Liberties Union (ACLU), in early days the National Association for the Advancement of Colored People (NAACP), more recently the National Organization of Women (NOW), the Sierra Club, the Center for Law and Social Policy and so forth — may play a greater role in the United States than do their nearest counterparts in Canada. In the United States, such groups often institute legal proceedings, and they also frequently enter an appearance as an *amicus curiae* (*amici* being much more freely welcome in judicial proceedings in the United States than in Canada). Also, while any individual case where the cause is just and so forth may be pursued to the point of becoming a judicial landmark, unfortunately major litigation is generally very expensive in terms of both effort and money, and large United States charitable organizations —

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the Canadian Federal Court of Appeal from federal boards, commissions or tribunals also finds no parallel. Canadian Federal Court Act, *supra* note 3, sec. 28(4). For a minor exception, see 28 U.S.C. § 1364, which provides for Senate actions for declaratory judgments concerning subpoenas.

68. Fla. Stat. § 25.031 (1977), Fla. App. Rule 4.61; Mass Const., art. II.

69. 28 U.S.C. §§ 2201-02.

70. On the chief limitation on the power of the United States federal judiciary — *i.e.*, the requirement of art. III, § 2, of the U.S. Constitution (*see supra* TAN 2) that federal courts exercise their power only to resolve “cases” or “controversies” — see, *e.g.*, L. Tribe, *supra* note 11, at 20, 62-68 (1978). United States federal and state doctrines of mootness are not always congruent. *See, e.g.*, Richardson V. Ramirez, 418 U.S. 24, 34-40 (1974).

such as the Carnegie, Ford and Rockefeller Foundations — provide vital support to public interest groups. It may be that equivalent roles will develop in the Canadian system, although limitations on the role of *amici*, strong Canadian traditions and the provisions of the tax laws restricting accumulations of capital by nonprofit organizations may discourage such a development. But otherwise, in urging judicial activism, liberals and constitutional enthusiasts in Canada may not be entirely pleased with the limited type of cases that will tend to come before the courts. Another difference between the two countries that seems quite significant on this point is the fact that, while they are impermissible in most provinces, contingency fees are fully respectable throughout the United States.<sup>71</sup> This, too, has provided certain incentives for bringing and sustaining civil rights and other constitutional litigation south of the border.

There are, of course, innumerable other differences in substantive and procedural rights of parties before courts in Canada and the United States. One that is in a class by itself and deserving of special mention here, however, is the privilege against self-incrimination found in the Fifth Amendment to the United States Constitution. Just as in Canada a defendant may elect not to take the stand,<sup>72</sup> the Fifth Amendment to the U.S. Constitution states that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” In the United States, however, this Fifth Amendment protection (made applicable to the states through the Fourteenth Amendment) has been interpreted broadly to provide that a witness cannot be compelled to give self-incriminating testimony in answer to official questions unless granted use or derivative use immunity.<sup>73</sup> The protection of the Canada Evidence Act, that a witness can be compelled to testify over his objection but such actual testimony may not be used in any other action or proceeding,<sup>74</sup> does not

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71. That is to say that contingency fees, in and of themselves, are considered quite acceptable. It is what some lawyers do with them that is lamentable.

72. See Canadian Charter of Rights and Freedoms, sec. 11(c).

73. In the United States, the government may compel testimony from an unwilling witness, who invokes the 5th Amendment privilege against self-incrimination, by conferring on the witness immunity from use of the compelled testimony and of evidence derived therefrom (“use and derivative use” immunity). The Government need not, however, grant the witness immunity for offenses to which compelled testimony relates (“transactional” immunity). See *Kastigar v. United States*, 406 U.S. 441 (1971), *reh’g denied*, 408 U.S. 931 (1972). See also 18 U.S.C. §§ 6002-03.

Corporations, it is worth noting in passing, do not enjoy such Fifth Amendment privileges under United States law. Conrary to the situation of natural persons, a corporation must turn over documents and otherwise comply with legal requests for information even if to do so might incriminate the corporation itself (e.g., in antitrust and other situations where criminal charges may be brought against a corporation) or one or more of its directors, officers or employees.

74. Canada Evidence Act, R.S.C. 1970, c. E-10, sec. 5. These protections apply, however, not

appear to be as extensive or to have received as far-reaching interpretations by Canadian courts; nor does the similar provision on self-incrimination in the *Charter of Rights and Freedoms*.<sup>75</sup> Since the protection against self-incrimination is broader under United States law, where it may be applicable, Canadians may wish to seek legal advice not only in criminal proceedings but also in complying with various discovery requests in connection with civil litigation in the United States.

The bottom line of all of this is that United States caselaw has one or more answers for virtually every question one might think to ask. The opinions of judges in the United States, of course, have no precedential value in Canada, but they may be very useful to Canadian practitioners and judges in formulating their arguments and opinions. Like almost everything else, however, there can be too much of a good thing, and Canadians need to have some basic idea of United States law and the nature of the United States judicial system in order to be able intelligently to evaluate the persuasive value and implications of the cases to which they are referring.

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only to testimony which may tend to incriminate a witness, but also to that which "may tend to establish his liability to a civil proceedings." Such is not the case with the U.S. Fifth Amendment.

75. *Charter of Rights and Freedoms*, *supra* note 72, sec. 13. This section provides only that a witness who testified in any proceedings "has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings."